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Number:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

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ANJUM MALIK,
Petitioner

v.

CONTINENTAL AIRLINES, INC.,
Respondent

* * * * * * * * *

On Petition for Writ of Certiorari to the
Fifth Circuit Court of Appeals

* * * * * * * * *

PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

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I. QUESTIONS PRESENTED:

1. When Malik bargained for CARRY-ON baggage services, but CAL[1] unilaterally modified these to CHECKED baggage services, *without* ***notice*** to or ***consent*** from Malik, could Malik still be bound by the COC provisions for these new (and unilaterally modified) set of services?

2. If passengers [such as Malik] are strictly bound by COC provisions, could airlines [such as CAL] avoid strict adherence to 14 C.F.R. Parts 253 & 254?

3. When CAL unilaterally modified the nature of the airline baggage services, *without* ***notice*** to or ***consent*** from Malik, were her state law remedies still PREEMPTED by the Airline Deregulation Act ["**ADA**"]?

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[1] "**CAL**" abbreviation, which is also the NYSE symbol for this airline, will be used for **CONTINENTAL AIRLINES, INC.** The notable exceptions are the excerpts from the **Contract of Carriage** ["**COC**"], which use "**CO**" to refer to CAL.

II. LIST OF PARTIES:

The names of both parties (ANJUM MALIK & CONTINENTAL AIRLINES, INC.) appear in the style of the case on the cover page.

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VI. STATEMENT ON JURISDICTION:

The underlying U.S. District Court case in the Western District of Texas – Austin Division (no: 1:06-CV-695-LY) went through two appeals before the Fifth Circuit (no: **08-50373 & 09-50444**). This is a **PETITION FOR WRIT OF CERTIORARI** to the Fifth Circuit Court of Appeals and the U.S. Supreme Court has jurisdiction under **28 U.S.C. § 2101 (c)**.

Under **Rule 10 (c)**, Petitioner Malik asks this Honorable Court to decide whether a passenger's state law remedies are preempted by the **Airline Deregulation Act** [**Title 49** of U.S.C.] and the passenger is bound by the provisions of the contract-of-carriage [COC] even if the previously agreed-upon COC provisions have been *unilaterally* and *unanticipatably* modified by the airline *without notice to* or *consent from* the passenger and in a way that is very *detrimental* to her.

VII. STATEMENT OF THE CASE:

A. Course of Proceedings:

Plaintiff Malik's state court action, originally filed on July 25, 2006, was removed to federal court by Defendant CAL, on August 31, 2006. Upon CAL's Amended Rule 12(b)(6) Motion to Dismiss, U.S. Magistrate Judge Pitman issued his January 29, 2008, REPORT & RECOMMENDATIONS ["R&R"] and recommended dismissal. After a dismissal **ORDER & FINAL JUDGMENT** by U.S. District Judge Yeakel on March 11, 2008, and an April 4, 2008, **ORDER** denying reconsideration, Malik filed her **NOTICE OF APPEAL** on April 17, 2008.

After a November 10, 2008, **JUDGMENT** by the Fifth Circuit (affirming in part, reversing in part, & remanding **USCA case # 08-50373**), the District Court issued a January 12, 2009, ORDER asking for the parties' respective cross-motions on the issue of the "enforceability of the liability limitations" for lost baggage in CAL's COC. After CAL and Malik filed their cross-MOTIONS FOR PARTIAL SUMMARY JUDGMENT, U.S. Magistrate Judge Pitman issued his R&R on April 13, 2009, generally agreeing with CAL's position. On May 14, 2009, U.S. District Judge Yeakel issued his **ORDER ADOPTING R&R** and his **FINAL JUDGMENT**. Malik filed her **NOTICE OF APPEAL** on May 22, 2009.

A Fifth Circuit Panel issued its **PER CURIAM DECISION** (affirming the District Court in **USCA case # 09-50444**) on March 10, 2010, and enforcing the COC liability limitations. Malik filed a **PETITION**

FOR REHEARING *EN BANC* on March 23, 2010, but the Fifth Circuit declined on **April 9, 2010**.

B. Statement of Facts:

Although this case is about a lost suitcase, what makes it different from any other such case is a series of "**unusual events**," each of which is never supposed to happen to anybody. On May 18, 2006, Malik boarded Continental Flight 251 (a full flight of 124-seater Boeing 737-700), traveling from AUS (Austin Bergstrom Int'l Airport in Texas) to EWR (Newark Liberty Int'l Airport in New Jersey) to then take a connecting flight to PVD (T.F. Green State Airport in Providence, Rhode Island). She was traveling to Bristol, Rhode Island, in order to participate in the multi-event Inaugural Graduation Ceremonies of the Initiative to Educate Afghan Women ["IEAW"] held during the Golden (50th) Commencement exercises of Roger Williams University ["RWU"] in Bristol, Rhode Island. First Lady Laura Bush (the Honorary Chair of IEAW) was going to be the Commencement speaker and Malik was a VIP (first row) invitee of Mrs. Paula Nirschel, wife of the RWU President.

Malik carried her only suitcase (purchased from the *Skymall* magazine and specifically designed as a carry-on to fit in the overhead bins) to the passenger cabin with her. It contained various valuables, including hand-embroidered clothing and several pieces of antique (including a gift from the British Viceroy to her family), exotic, and heirloom jewelry.

Because the bin over her own seat (**seat 18-B**) was full, with the assistance of a female flight attendant, she placed her carry-on suitcase in an overhead bin (**selected by** and, after placing the suitcase, securely **closed by** this female flight attendant) over **row 5**. She only took out her wallet, which contained her cash and credit cards, as well as (on an outside pocket) her reading glasses and her cell phone.

After the plane left the gate and **as it was taxiing** towards the runway, a male flight attendant announced Malik's name over the intercom. He then came and said to "Mrs. Malik" that he **had to remove**[2] her carry-on suitcase (which had a leather name tag with only her address and phone number but **not** her name) from the overhead storage bin (over row **5**) and that it **had been sent**[3] to the under-cabin cargo compartment (as if it were "CHECKED"). When Malik asked how he knew it was

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[2] Malik does not actually know whether her carry-on had really been removed from the row 5 bin and placed in the cargo compartment; she was just told so.

[3] UNUSUAL EVENT # 1: *A carry-on placed in an overhead bin is **almost never** removed if it fit and if the **bin** has **already** been **shut**.* A carry-on would only be removed from a closed bin if an economy passenger, without authorization, places her carry-on in a business class or first-class bin.

UNUSUAL EVENT # 2: *A carry-on is **never** checked **without notifying** the passenger and without giving the passenger an opportunity [a] to retrieve her valuables and her objects of immediate need (such as feminine hygiene needs, cosmetics, medications, etc.) and [b] to possibly buy additional insurance or [c] to possibly choose to take a later flight instead of letting her bag "checked."*

her bag, he showed her the ticket jacket and told her that he *had to* retrieve[4] it from her carry-on. Because Malik's jewelry was individually packed in separate see-through clear plastic Ziploc bags, it would have been impossible for somebody who had retrieved the ticket jacket not to see the jewelry.

When Malik tried to explain to the male flight attendant how important it was for her that her carry-on arrive on time, that she had all her clothes there (she was just wearing casual clothing on the plane), etc., and asked whether she could get back her carry-on in EWR, he simply told her that the suitcase had been checked all the way to PVD, that she would get it in PVD and **handwrote**[5] a supposed multi-digit **"claim number" on** the back of the **ticket jacket**. When Malik attempted to inquire about her suitcase, the CAL ground crews either at EWR or at PVD could not make any sense out of this make-believe "claim number."

When Malik arrived at PVD Thursday (May

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[4] UNUSUAL EVENT # 3: *Flight attendants never open and go into somebody's carry-on baggage, or purse, without permission*. The only exception would be when all the passengers deplane and some carry-on is left in the passenger cabin: [a] if the object looks suspicious, they call security or, [b] if it looks like a benign carry-on, it is taken and delivered to the ground crew **unopened**.

[5] UNUSUAL EVENT # 4: *A carry-on (or any other type of airline baggage) is never checked **without a baggage claim tag***. The regular 3-part baggage claim tag, which is used for **gate-checks**, is part-printed (claim number) and part-handwritten (passenger's name, seat number, destination, & flight number).

18) night, her suitcase did not arrive. Both the staff of the RWU President's office and the staff of Bristol Harbor Inn (where she stayed) scrambled to find her some clothing and cosmetics to get her ready for the Friday (May 19) functions and the Saturday (May 20) commencement exercises. Bristol Harbor Inn's staff Thursday night and through Friday made numerous calls to CAL's PVD staff and they were repeatedly assured that Malik's suitcase had been found[6] and that it was on the "next plane" and, after the "next plane" arrived, on the following "next plane." Despite these false reassurances, Malik's suitcase has not been found either then or since.

As a result of CAL's targeted removal of Malik's carry-on suitcase without any notice to her and without her consent, denying her even a momentary opportunity to retrieve her jewelry from her carry-on suitcase (or buy additional insurance), Malik has been damaged in an incalculable amount

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[6] Out of around 50,000 outgoing flights (around 5,000,000 outgoing passengers) from AUS in 2006, **fewer than 0.5** % (around 0.4 % for CAL) of the passengers experienced any mishandling of their baggage (baggage misdirected or otherwise coming late). Almost all of these mishandled suitcases were later quickly located and reached their owners within 24-to-72 hours. "Air Travel Consumer Report," July 2007 by U.S. Dept. of Transportation.

UNUSUAL EVENT # 5: *Only **2** single suitcases (out of about one million bags or about **1 in 500,000**) were known to have been permanently lost in the whole year of 2006 by United Airlines at AUS.* Nationally, United and Continental have relatively similar baggage mishandling rates: United had **0.389** % and **0.483** % mishandling in, respectively, May of 2006 and May of 2007, Continental had respective rates of **0.385** % and **0.502** %. "Air Travel Consumer Report."

and her intergenerational family heirlooms were lost forever. She was also unable to fully participate in the graduation ceremonies and present the gifts she (as the only prominent Muslim invitee to their graduation) had hand-selected for the three graduating Afghani Muslim women.

A "CARRY-ON" bag and a "CHECKED" baggage are very different from each other in both CAL's view, as expressed in its COC [Rule 1], and that of a *reasonable passenger*, because most of the COC liability exclusions apply to items[7] a passenger would typically *only* take in her a "CARRY-ON." In the COC, the"CARRY-ON-Baggage" and "CHECKED Baggage" definitions are given in ***mutually exclusive*** terms. In the words of COC [Rule 1], "**CARRY-ON-BAGGAGE** means baggage, ***other than*** *CHECKED Baggage*, carried on board an aircraft by a ticketed Passenger ***also known as*** *UNCHECKED baggage*" and "**CHECKED BAGGAGE** means baggage that a ticketed *Passenger has requested* be carried by the carrier and for which the carrier has issued a *BAGGAGE CLAIM TAG* to the Passenger." In the instant case, Malik neither (1) "requested" that her bag be "CHECKED," nor (2) was she informed that it was "CHECKED" until it was too late, and nor (3) has she ever been issued a "BAGGAGE CLAIM TAG," all COC

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[7] Listed in the different sub-sections of COC Rule 28 (C)(8)(a), such as MP3s [-v]; **laptop computers** [-vii]; **cell phones** [-x]; **eyeglasses** [-xi]; irreplaceable items [-xiii]; **business/personal documents** & negotiable papers/securities [-xiv]; **jewelry** [-xv]; **keys** [-xvi]; perfumes [-xvii]; **medicines** [-xviii]; **money** [-xix]; natural fur products [-xx]; **cameras** [-xxii]; precious metals/stones [-xxiii]; and **watches** [-xxvii].

violations. When Malik boarded the plane, she *only* **bargained** with CAL for her right to one piece of "CARRY-ON" under the COC's Rule 23 (B)(2), "Carry-on Free Baggage Allowance," and for nothing else.

VIII. ARGUMENT:

A. NO "REASONABLE COMMUNICATIVENESS":

1. Contract Modification in Airlines:

A contract "is but a meeting of the minds, and those who enter into a contract may *by mutual agreement* rescind or alter it." *West India Ind. v. Tradex, Tradex Petroleum Serv.*, 664 F.2d 946, 949 (5th Cir. 1981). "Any contract [may be] modified by subsequent agreement of the parties." *Id.*, 664 F.2d at 949, n. 4. In Texas, "[w]hether a contract is modified depends on the parties' intentions and is a question of fact. The burden of proving modification rests on the party asserting the modification." *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228-29 (Tex. 1986); *Hondo Oil & Gas v. Texas Crude Operator, Inc.*, 970 F.2d 1433, 1437 (5th Cir. 1992).

In order "to prove a MODIFICATION of [the COC provisions, CAL] asserting the modification must prove two things: (1) **NOTICE** of the change; and, (2) **ACCEPTANCE** of the change.... To prove NOTICE, [CAL] asserting a modification must prove that [its flight attendants] unequivocally notified [Malik] of definite changes [from "CARRY-ON" to "CHECKED" baggage and that Malik had] knowledge of the proposed modification." *Hathaway*, 711 S.W.2d at 229.

Malik does not dispute that CAL "reserved the right to check any passenger's bag in the [COC] by which Malik agreed to be bound." Rule 23 (B)(2)(a)(i). But this *only* satisfies the 2nd prong of the *Hathaway* "MODIFICATION TEST" (on *ACCEPTANCE*) but Malik's

objection is that the 1st prong of the *Hathaway* "MODIFICATION TEST" (on *NOTICE*) is not satisfied. 711 S.W.2d at 229. Any reasonable person (be it passenger or flight attendant) would know that passengers' "carry-on"s contain their most important belongings (and most immediate necessities) and a flight attendant cannot just "check" these bags without notifying the passengers and giving them a chance to retrieve what they need.

2. COC Modification & Airline Liability Limitations:

Under the ADA, "[c]arriers are allowed to limit their liability in the [COC]." *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 930 (5th Cir. 1997). In order to allow the liability limitations, the courts "apply a TWO-STEP ANALYSIS in determining whether liability limiting provisions are adequately plain and conspicuous to give REASONABLE *NOTICE* of their meaning." *Casas v. American Airlines, Inc.*, 304 F.3d 517, 524 (5th Cir. 2002); *ABX*, 117 F.3d at 930. First, the ***physical*** *characteristics of the notice* and, secondly, the ***conditions*** *surrounding the passenger's travel* are examined. *Casas*, 304 F.3d at 524-25; *ABX*, 117 F.3d at 930-31.

Malik's claim is based, *not* on the *physical* characteristics but, on whether "the *conditions* surrounding [her] travel gave [her] **reasonable opportunity *to notice*** [*and to act upon*] the meaning of the liability exclusions." *Casas*, 304 F.3d at 525; *ABX*, 117 F.3d at 930. "[U]nder the *two-pronged* **REASONABLE COMMUNICATIVENESS** TEST [summarized in *Casas*], [a passenger, such as Malik]

is contractually bound by the limitation of liability." *Deiro v. American Airlines, Inc.*, 816 F.2d 1360, 1365 (9th Cir. 1987). "Under this DOCTRINE [OF '**RELEASED VALUATION**'], in exchange for a low carriage rate, the passenger-shipper is deemed to have released the carrier from liability beyond a stated amount. The carrier can lawfully limit recovery to an amount less than the actual loss sustained *only if it grants its customers a* ***FAIR OPPORTUNITY to choose*** between higher or lower liability by paying a correspondingly greater or lesser charge.... Therefore, *the* [*passenger*] *is bound only if he has* ***reasonable notice*** of the rate structure *and is given a* ***FAIR OPPORTUNITY*** *to pay* the higher rate in order to obtain greater protection." *Id.*

The instant case revolves on whether "the *conditions surrounding* [Malik's] *travel* gave [her] **reasonable opportunity to notice** [*and* ***act upon***] **the meaning of the liability exclusions**." *Casas*, 304 F.3d at 525. Malik's travel conditions were very unusual because the "BARGAINED FOR" baggage handling "services" for a "CARRY-ON" were unilaterally altered by CAL (**i**) *without NOTICE to or CONSENT from* Malik, (**ii**) in the absence of an emergency, (**iii**) in implied violation of the COC provisions, and (**iv**) in a way that was not "ANTICIPATABLE." Therefore, none of the COC lost baggage (either for "CHECKED" or for "CARRY-ON" baggage) liability limitations may apply to her.

"[B]ased upon their acts and conduct," [*Hondo Oil*, 970 F.2d at 1437] Malik and CAL made a contract for a "CARRY-ON-BAGGAGE", and she never agreed to a contract for (nor assumed the risk

associated with) a "CHECKED BAGGAGE" because *in no reasonable passenger's experience does any airline remove a CARRY-ON bag and transform it into its very opposite, CHECKED baggage* during a **2-leg/6-hour flight**, *without notifying the passenger* and giving her a chance to retrieve her valuables, travel documents, medications, cosmetics, etc., and to, possibly, buy insurance. It is totally "un*anticipatable*" to an airline passenger that her CARRY-ON may be CHECKED by the flight personnel *without notifying* her.

B. COC VIOLATIONS OF 14 C.F.R. §§ 253 & 254:

1. General Regulatory Framework:

Through the ADA, Congress attempts to simplify the regulation of the airlines and prevent the imposition of 50 different sets of regulations by the 50 individual states. This is supposed to create a sound business environment which will benefit both the airlines and, through well-regulated competition, lower rates, and better services, the flying public (the passengers) also. The rights and obligations of the passengers are described in several dozens of small-print pages drafted by the airlines under the name of "Contract of Carriage," COC, and, in order to protect the flying public from possible abuse by the airlines, some of the critical wording of the COC is strictly regulated by the FAA (Federal Aviation Administration) through, *e.g.*, 14 C.F.R. Parts 253 & 254.

Under the ADA, "[c]arriers are [generally] allowed to limit their liability in the [COC]." *ABX, Inc.*, 117 F.3d at 930. One may think that requiring a strict compliance of the airline COCs with 14 C.F.R., Parts 253 & 254, may impose too heavy a regulatory burden on the airlines. But, compared to the burden imposed on the passenger for a simple 2-leg flight, there is nothing unusual in imposing a strict compliance rule on the airlines. The burden imposed on Malik for the 2-leg[8] AUS-EWR-PVD flight was a total of **119 pages**[9] of small-print, single-spaced COCs with some confusing and, possibly, false information.

2. Federal Regulation of COC & Liability Limitations:

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[8] Malik's AUS-EWR leg (Flight # 251) was flown by **CAL** and the EWR-PVD leg (Flight # 2225) by **ExpressJet Airlines** under a "CODE-SHARE" [defined in Rule 1, COC, agreement. Under Rule 3 (C) of COC, "Under arrangements with CO, independent carriers may provide ... Code Share services. Travel on those independent carriers is *subject to the terms and conditions of the* ***contract of carriage of the independent carriers***, which may differ from CO's Contract of Carriage."

[9] The **CAL** COC is a **45-page** document. The COC of **ExpressJet Airlines** [available at www.expressjet.com/documents/Cofc.pdf] is a **58-page** document, which is governed [the Preamble of the COC states, "ALL SUCH TRANSPORTATION IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS, *TO THE EXTENT SUCH IS NOT INCONSISTENT WITH THE TERMS AND CONDITIONS OF ANY APPLICABLE CHARTER AGREEMENT*"] by the **16-page** "STANDARD TERMS AND CONDITIONS" [available at: http://charter.expressjet.com/documents/Terms.pdf].

Although 14 C.F.R. § 254.4 states that "an air carrier ***shall not*** limit its liability for provable **direct *or consequential* damages** resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property, including baggage, in its custody to an amount less than $ 3,000 [then, in 2006, $2,800] for each passenger," COC directly contradicts the C.F.R. when COC Rule 28(C)(6)(a) states that "CO **SHALL *NOT* BE LIABLE FOR *ANY CONSEQUENTIAL* DAMAGES** arising from the loss of, damage to or delay in delivery of Baggage."

14 C.F.R. Part 253 is about "**NOTICE** of Terms of Contract of Carriage [COC]." 14 C.F.R. § 253.1 indicates that "[t]he purpose of this rule is to set uniform disclosure requirements, which preempt any State requirements on the same subject." Because, through the COC notice, CAL violates 14 C.F.R. § 254.4, in accordance with 14 C.F.R. § 253.4(a), "[CAL] **may not** *claim the benefit* as against [Malik] of, and [Malik] **shall not** be *bound by*" any lost baggage liability limits.

"Where the invalid portion of a contract can be severed from the remainder without impairing the valid part, the latter will be sustained and the contract *pro tanto* [i.e., only to that extent] enforced." *City of Del Rio v. Ulen Contracting Corp.*, 94 F.2d 701, 705 (5th Cir. 1938). "[U]nclear language [should] be resolved **against** the draftsman [i.e., CAL] or **the party for whose *benefit* the term is inserted**." *Craddock v. Greenhut Constr. Co.*, 423 F.2d 111, 114 (5th Cir. 1970).

C. NO PREEMPTION UNDER THE ADA:

The AIRLINE DEREGULATION ACT of 1978 ["ADA," scattered in Title 49 of U.S.C.] prohibits "a State from enact[ing] or enforc[ing] a law [or] regulation ... related to a price, route, or ***service*** of an air carrier." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n. 1 (1995)(*quoting* 49 U.S.C. § 41713(b)(1)); *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 352 (5th Cir. 1993)(3-judge panel) ["*Hodges I*"]; *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995)(*en banc*)["*Hodges II*"]. "'Services' generally represent a ***bargained for*** *or* ***anticipated*** *provision of labor* from one party to another.... Elements of the air carrier service bargain include ... *baggage handling*." *Hodges II*, 44 F.3d at 336 (*quoting Hodges I*, 4 F.3d at 354).

1. Lack of BARGAIN:

In the COC, CAL gives the definitions of "CARRY-ON-BAGGAGE" and "CHECKED BAGGAGE" in ***mutually exclusive*** terms. In the instant case, Malik (1) neither "requested" that her bag be "checked" nor did she learn that it was checked until it was too late and (2) she also was never issued a baggage claim tag, both violations of the COC.

Malik and CAL made a contract for a "CARRY-ON-BAGGAGE", and she never agreed to a contract for (nor assumed the risk of) a "CHECKED BAGGAGE."

Unless there is "a clear and unambiguous waiver," no unilateral contract modifications are

allowed "without NOTICE to or CONSENT by" the other party. *Federal Deposit Ins. Corp. v. Nobles,* 901 F.2d 477, 480 (5th Cir. 1990); *see also Allstate Ins. Co. v. McKenzie,* 246 F.2d 151, 153-54 (5th Cir. 1957). Given the different nature and treatments of these two bags, there is **no bargain** once the "CARRY-ON" is converted into "CHECKED" unilaterally, *without notice,* in the absence of an emergency.

2. Lack of ANTICIPATABILITY:

Any removal of a passenger's carry-on *without notification* and without remedial opportunities, such as [1] gate-checking the carry-on; [2] buying extra insurance; [3] removing valuables, fragile items, and items of immediate need from her carry-on; or [4] choosing to fly on a later flight without having to "check" her carry-on bag is totally *unforeseeable.*

CAL's own COC acknowledges the critical importance of Notice in Rule 24 (D), which states that "[I]N THE EVENT OF A ***FORCE MAJEURE*** EVENT, CO, ***WITHOUT NOTICE***, MAY CANCEL, TERMINATE, DIVERT, POSTPONE, OR DELAY ANY FLIGHT ...." The "Force Majeure Event" is the only reference to "without notice" that is seen in the COC, which implies that only in very unusual circumstances does the COC allow any modifications of the COC provisions ***without*** *proper* ***NOTICE*** to the passenger.

3. No "Forbidden SIGNIFICANT ECONOMIC EFFECT":

Malik has several state law causes of action against CAL: (i) Breach of Contract, (ii) Deceptive Trade Practices, (iii) Conversion[10] (theft), and (iv) Invasion of Privacy.

Those "claims" that do not "relate" to "services" are not preempted by the ADA. *Hodges II*, 44 F.3d at 340. "'[S]ome state actions may affect airline fares in *too tenuous, remote, or peripheral a manner*' to have preemptive effect." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (*quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21 (1983)). Tort claims like *slander* and *false imprisonment*, as well as a "challenge to airline's ***frequent flyer program***," were found *not* to be "*relate[d]* to rates, routes, or services and w[ere] ***not*** *preempted*." *Bayne v. Adventure Tours USA, Inc.*, 841 F.Supp. 206, 207, 208-09 (N.D. Tex. 1994)(discussing other cases in Tex., Miss., La., & Ill. which denied preemption). Two of Malik's causes of action, for Conversion and for Invasion of Privacy seem to fall into this category of having "***too tenuous, remote, or peripheral***" a relatedness to airline baggage handling services to merit preemption.

Preemption would be required when state law remedies "have the 'FORBIDDEN SIGNIFICANT (ECONOMIC) EFFECT' on airline rates, routes, or services, as contemplated by *Morales* [504 U.S. at 388]." *Travel All Over the World, Inc. v. Kingdom of*

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[10] Internal communication of CAL personnel on June 12, 2006 (25 days after the eventful flight), by Colleen [a CAL internal investigator], ends with the following recommendation:
"I BELIEVE THIS NEEDS TO GO TO CORP SECURITY."

Saudi Arabia, 73 F.3d 1423, 1433 (7th Cir. 1996); *Hodges II*, 44 F.3d at 339.

Similarly, "conflicts" between state and federal law, which would either "frustrate the accomplishment of a federal objective [or would] make it 'impossible' for private parties to comply with both state and federal law" would necessitate PREEMPTION." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000); *Hodges II*, 44 F.3d at 335 n. 1.

IX. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner ANJUM MALIK respectfully prays that the JUDGMENT of the Fifth Circuit Court of Appeals be REVERSED due to LACK OF NOTICE & CONSENT in CAL's ***unilateral*** *modification* of the baggage service contract from "CARRY-ON" to "CHECKED" baggage.

Respectfully submitted,

/s/ Anjum Malik

ANJUM MALIK
Petitioner *pro se*
7804 Heathercrest Circle,
Austin, Texas 78731
(512) 345-6246, home phone
(512) 472-6666, work phone
(512) 799-5044, cell phone
a.malik@houseoftutors.edu

Certificate of Service

This is to certify that 3 (three) true and correct copies of the foregoing Petition have been mailed to ADAM T. SCHRAMEK, Esq., & MARCY HOGAN GREER, Esq., of Fulbright & Jaworski at 600 Congress Avenue, Suite 2400, Austin, Texas 78701, on this, the 11th, day of September, 2010.

/s/ Anjum Malik

ANJUM MALIK

Certificate of Compliance

No: 10-_____

ANJUM MALIK,

Petitioner

V.

CONTINENTAL AIRLINES, INC.,

Respondent

As required by Supreme Court Rule 33.1(h), I certify that the instant Petition for a Writ of Certiorari contains **4,016 words**, excluding the parts of the Petition that are exempted by Rule 33.1(d), and that it is written in **size 12** CENTURY SCHOOLBOOK font (footnotes in **size 11**)..

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Anjum Malik

ANJUM MALIK

September 11, 2010

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Appendix: "A"

U.S. MAGISTRATE JUDGE'S

REPORT & RECOMMENDATION Excerpt:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ANJUM MALIK

V.

CONTINENTAL AIRLINES, INC.

Civil Action No: A-06-CA-695-LY

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISRATE JUDGE[1]

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[1] The following excerpts consist only of the parts entitled III. ANALYSIS & IV. RECOMMENDATION. The introduction and the parts entitled I. BACKGROUND; II. STANDARD OF REVIEW; and V. OBJECTIONS are not included.

III. ANALYSIS

The determination of both summary judgment motions hinges on the applicability of the liability limitations and exclusions contained in Continental's contract of carriage. Continental maintains Plaintiff's federal common law claim for the value of her lost luggage is subject to the limitations imposed under the airline's contract of carriage. As set forth above, the contract of carriage specifically limits Continental's liability to $2,800 per passenger. In addition, the contract of carriage specifically excludes Continental from liability for the loss of "antiques, artifacts, heirlooms, collectibles," "irreplaceable items," "jewelry," "liquids, perfumes," "medicines," "precious metals/stones," "watches" and "any other similar valuable property or irreplaceable property included in the Passenger's Checked or Carry-on Baggage."

Plaintiff does not dispute the contract of carriage contains an explicit limitation on liability of $2,800 per passenger. Malik further admits airline passengers are generally subject to the limitations in the airline's carriage of contract ("Carriers are allowed to limit their liability in the contract of carriage"). However, Plaintiff argues the limitations are not enforceable against her because she was not provided with adequate notice, the contract of carriage violates the applicable federal regulations and the terms of the contract of carriage were unilaterally altered by Continental.

An air carrier is permitted to incorporate by reference in a ticket or written instrument any term of the contract for providing interstate air

transportation. If an air carrier chooses to incorporate contract terms by reference, notice to the passenger must be provided. If the carrier fails to give the required notice, the carrier may not claim the benefit of those incorporated terms and the passenger cannot by bound by them. These incorporated terms include an air carrier's limits on liability for lost baggage.

In evaluating the sufficiency of the notice, the Court must determine "whether the liability limiting provisions were sufficiently plain and conspicuous to give reasonable notice of their meaning." First, the court must examine the physical characteristics of the contract of carriage, looking to features such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions to determine whether they provide "reasonable notice" to the passenger. Second the court looks to the circumstances surrounding the purchase and subsequent retention of the ticket, including the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the provision of the ticket, and any other notice that the passenger receives outside of the ticket.

As set forth above, Plaintiff admits she was provided adequate notice that Continental's contract of carriage would govern the terms and conditions of her flight. She further admitted her ticket was placed in a ticket jacket containing the liability limitations. Malik also testified she had traveled extensively. In addition, the contract of carriage itself, although long, contains a detailed table of

contents and the liability limitations are set forth in relatively clear language. These factors all weigh heavily in favoring of finding the notice adequate. *See Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 525 (5th Cir. 2002) (page attached to airline ticket containing written liability limitation, combined with sophistication of traveler and value of property giving plaintiff incentive to scrutinize baggage limitation, sufficient to provide reasonable notice of limitation to plaintiff).

Malik's objection to the adequacy of the notice rests first on the language used by Expedia and Continental regarding the limit of liability for lost luggage. Plaintiff argues that the notice by Expedia that "federal rules require any limit on an airline's baggage liability to be at least $1,250 per passenger" for domestic travel was false because federal law at the time set a legal minimum liability of $2,800 per passenger.

Plaintiff's argument fails for two reasons. First the Expedia notice is not factually incorrect. Federal law at the time set a legal minimum liability which was "at least $1,250 per passenger," namely $2,800 per passenger. Further, both the contract of carriage, referred to in the Expedia website and email, and the ticket jacket clearly set forth the $2,800 limitation and identified that amount as "Continental's limit." The ticket jacket additionally noted "some carriers, including Continental assume no liability for fragile, valuable or perishable articles that are lost." Accordingly, it is clear Plaintiff had received notice of the monetary amount of Continental's liability limitations.

Malik further argues the notice is inadequate because it does not comply with the applicable federal regulations. Specifically, she cites to the regulatory provision, which stated:

> On any flight segment using large aircraft, or on any flight segment that is included on the same ticket as another flight segment that uses large aircraft, an air carrier shall not limit it's liability for provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property, including baggage, in its custody to an amount less than $2,800 for each passenger.

14 C.F.R. § 254.4.[2] According to Plaintiff, this language is clearly violated by the provision in Continental's contract of carriage which stated:

> Liability for the loss of, damage to or delay in delivery of a Passenger's personal property, including Baggage, when such personal property or Baggage has been checked... is limited to USD 2,800 per Ticketed Passenger. Passenger will be responsible for documenting and proving the actual value of the loss. [Continental] shall not be liable for any consequential damages arising from the loss of, damage to or delay in delivery of Baggage.

(COC at 42). Malik complains the attempt by Continental by way of this language to disclaim

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[2] The dollar amount has since been increased to $3,300 per passenger.

liability for any consequential damage is violative of section 254.4.

Plaintiff is correct in pointing out that the language of Continental's contract of carriage does not directly track the language of the federal regulation. However, the undersigned does not find her argument that that the contract of carriage embodies the same numeric limitation on the two categories of damages. Noting in the federal regulation prohibits an airline from choosing its own formula for limiting liability as long as the sum of the liability is no less than the amount set forth in section 254.4. Moreover, as Continental points out, it has not asserted the consequential damages provision as a defense to Plaintiff's claims. Finally, the Fifth Circuit has clearly rejected the notion that violation of section 254.4. by an airline's liability exclusion provisions renders the exclusion void. See *Casas*, 304 F.3d at 525 (even if liability exclusion violated section 254.4, the violation cannot resurrect plaintiff's federal common law claim as it would craft private right of action for violations of regulations and thus circumvent Airline Deregulations Act). Accordingly, the undersigned finds Plaintiff's argument without merit.

Malik finally argues that Continental unilaterally altered the conditions surrounding her travel. Plaintiff maintains that the flight attendant's conduct in checking her bag without prior notice to her was a change in her flight which she did not anticipate or bargain for. As a result, she contends she was deprived of a reasonable opportunity to

notice and act upon the meaning of the liability exclusion and the exclusion should thus not apply.

As Defendant points out, in the contract of carriage Continental "reserves the right in is sole and absolute discretion to determine the suitability and place of storage of any items to be carried in the cabin of the aircraft" and further "subject to carry-on storage capacities of the aircraft, Continental reserves the right to check a Passenger's carry-on baggage." As discussed above, Plaintiff was clearly put on notice of the provisions in the contract of carriage. Malik does not dispute the existence of the provision, however, she asserts that the change in status of her baggage was improper because she was not given notice and could not anticipate the conversion of the status of her bag. She thus contends the provision, and any baggage-related limitations, cannot apply to her.

Not surprisingly, Continental disagrees. Defendant points out that, at a minimum, Plaintiff's argument is overreaching. Malik points to no legal basis for her contention that the change in status of her baggage required specific and separate notice to her, and further for her contention that the unilateral status change rendered all provisions in the contract of carriage related to her baggage unenforceable. Rather, she simply asserts that "in no reasonable passenger's experience does any airline remove a carry-on bag and transform it into its very opposite, checked baggage, without notifying the passenger and giving her a change to retrieve her valuables and, possibly buying insurance." This assertion is insufficient alone to Malik's argument.

Moreover, Plaintiffs argument is clearly contrary to the language in the contract of carriage in which Continental reserved the right to check a Passenger's carry-on baggage. Plaintiff has cited to not provision in the contract which renders this reservation contingent on any notice to the passenger or other act by the airline. Accordingly, the undersigned finds Plaintiff has failed to establish the liability limitations of the contract of carriage do not apply to her claim. She is not, therefore, entitled to the partial summary judgment she requests.

In contrast, the undersigned concludes Continental has established the liability limitations in the contract of carriage do apply to Plaintiff's claim as the notice was sufficiently conspicuous, especially when considered through the lens of Malik's admittedly experienced traveler status, to give reasonable notice to Plaintiff. (Rejecting plaintiff's claim that liability limitations did not apply because airline agent accepted baggage knowing it contained jewelry and she did not have adequate notice of limitations based on plaintiff's status as experienced air traveler with sufficient time to read ticket and other documentation, finding reasonable notice provided where terms and conditions incorporated into contract of carriage set for the limitation of liability in clear and plain language, Plaintiff was experienced traveler who had purchased ticket at least three days before flight and limitation of liability was conspicuously posted at airport check-in counter).

Continental further asks this Court to apply those limitations to determine its liability to Plaintiff

for the value of her lost luggage. In support of this request, Defendant reiterates that the contract of carriage specifically excludes Continental from liability for the loss of antiques, heirlooms, collectibles, irreplaceable items, jewelry, liquids, perfumes, medicines, precious metals or stones, and watches. Plaintiff was asked during her deposition to estimate the value of items in her suitcase, excluding any and all jewelry, anything she considered to be irreplaceable, all liquids, perfumes, medicines, precious metals or stones, and watches. Plaintiff was asked during her deposition to estimate the value of the items in her suitcase, excluding any and all jewelry, anything she considered to be irreplaceable, all liquids, perfumes, makeup, medicines, and watches. Malik testified the remaining items were the suitcase, some clothing, shoes, and two handbags. She agreed the value of those items totaled approximately $800. Continental is willing to stipulate that the value of those items is $800. Plaintiff has not presented any contrary evidence or otherwise rebutted the validity of her estimation. Accordingly, the undersigned concludes the uncontested facts presented establish Continental's liability to Plaintiff for her federal common law claim for the value of her lost luggage to be $800.

IV. RECOMMENDATION

The Magistrate Court **RECOMMENDS** that the District Court **DENY** Plaintiff's Post-Appeal Motion for Partial Summary Judgment. The undersigned **FURTHER RECOMMENDS** that the

District Court **GRANT** Defendant's Motion for Summary Judgment on Plaintiff's Claim for the Value of Her Lost Luggage and enter judgment in favor of Plaintiff on her federal common law claim for the value of her lost luggage in the amount of $800.

. . . . .

SIGNED this 13th day of April, 2009

/s/ ROBERT PITMAN
UNITED STATES MAGISTRATE JUDGE

Appendix: "B"

U.S. DISTRICT COURT'S

ORDER ON REPORT & RECOMMENDATION:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ANJUM MALIK

V.

CONTINENTAL AIRLINES, INC.

Civil Action No: A-06-CA-695-LY

ORDER
ON REPORT AND RECOMMENDATION

ORDER
ON REPORT AND RECOMMENDATION

Before the court is the above styled and numbered case. Following remand by the United States Court of Appeals for the Fifth Circuit, Defendant Continental Airlines, Inc., ("Continental") moved for summary judgment on Plaintiff Anjum Malik's remanded federal common law claim for the value of her lost luggage and filed an Appendix of Evidence in Support, Malik responded, and Continental filed a reply. Additionally, Malik filed a Post-Appeal Motion For Partial Summary Judgment, Continental filed a response and Malik filed a reply. The Court referred the motions, response, replies, and Continental's appendix of summary-judgment proof of the United States Magistrate Judge for a report and recommendation. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72; Loc. R. W.D. Tex. Appx. C, 1(d). After considering motions, responses, replies, the summary judgment proof, the file, and the applicable law, the Magistrate Judge signed his Report and Recommendation on April 13, 2009. By his Report and Recommendation, the Magistrate Judge recommends that this Court deny Malik's Post-Appeal Motion For Partial Summary Judgment, grant Continental's motion, and render judgment in favor of Malik on her federal common law claim for the value of her lost luggage in the amount of $800. The parties received the Report and Recommendation on April 13, 2009, and objections, if any, were due to be filed on or before April 27. *See* Fed. R. Civ. P. 72(b) (within ten days after service of report and recommendation, party may serve and file specific written objections to proposed findings and

recommendations). Malik filed objections on April 27 and Continental filed a response to Malik's objections on May 4, 2009.

In light of Malik's objections, the Court has undertaken a *de novo* review of the entire case file in this action. The Court finds that the findings and conclusions of the Magistrate Judge are proper and, for substantially the reasons stated therein, the Court will approve and accept the Report and Recommendation.

Finally, in light of Malik's deposition testimony that if Continental's contract-of-carriage exclusions apply, the qualifying items in her suitcase are worth no more than $800, Continental's willingness to stipulate that the value of those items is $800, and as no other triable issues of fact remain, the Court will grant Continental's request to render judgment that Continental's liability to Malik for her federal common law claim for the value of her lost luggage is $800.

IT IS ORDERED that Malik's Plaintiff's Post-Remand Objections To Magistrate Judge's Report & Recommendation filed April 27, 2009 are **OVERRULED.**

IT IS FURTHER ORDERED that the United States Magistrate Judge's Report and Recommendation filed in this action is hereby **APPROVED AND ACCEPTED.**

IT IS FURTHER ORDERED that Defendant Continental Airlines, Inc.'s Defendant's Motion For

Summary Judgment on Plaintiff's Claim for the Value of Her Lost Luggage, filed February 17, 2009 is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff Malik's Post-Appeal Motion For Partial Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED that Continental's liability to Malik for her federal common law claim for the value of her lost luggage is $800.

The Court will render a Final Judgment separately from this Order.

SIGNED this 14th day of May, 2009.

/s/ LEE YEAKEL

UNITED STATES DISTRICT JUDGE

Appendix: "C"

U.S. COURT OF APPEALS OPINION:

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

ANJUM MALIK,
Plaintiff-Appellant

v.

CONTINENTAL AIRLINES, INC.,
Defendant-Appellee

No: 09-50444
Summary Calendar.
March 10, 2010.

369 Fed. Appx. 588, 2010 WL 835584
(C.A.5 (Tex.))

[*Appeal from the U.S. District Court for the Western District of Texas, Austin*]

PER CURIAM OPINION

*588

(Cite as: 369 Fed.Appx. 588, *588, 2010 WL 835584 (C.A.5 (Tex.)))

Mustafa Engin Derkunt, Derkunt Law Office, Austin, TX, for Plaintiff-Appellant.

Adam Troy Schramek, Marcy Hogan Greer, Fulbright & Jaworski, L.L.P., Austin, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas, USDC No. **1:06-CV-695**.

Before **GARZA**, **CLEMENT**, and **OWEN**, Circuit Judges.

PER CURIAM: FN

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(Cite as: 369 Fed.Appx. 588, *588, 2010 WL 835584, **1 (C.A.5 (Tex.)))

Continental Airlines lost Anjum Malik's baggage during her travels from Austin, Texas to

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FN Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Providence, Rhode Island by way of Newark, New Jersey. Malik's bag contained valuable items, including jewelry, and she filed suit to recover the value of her lost luggage, which she estimates to be $436,000. The district court held that Malik's Contract of Carriage with Continental excluded all but $800 of her claim and entered judgment in her favor in that amount.[FN1] [FN1] On appeal, Malik argues that

***589**

*(Cite as: 369 Fed.Appx. 588, *589, 2010 WL 835584, **1 (C.A.5 (Tex.)))*

the district court erroneously enforced certain exclusions in her Contract of Carriage.

Federal common law provides a cause of action for the value of lost luggage against air carriers. *See Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926-29 (5th Cir. 1997). But carriers are allowed to limit their liability by contract if they give reasonable notice to passengers. *Id.* at 930; *see also Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 524 (5th Cir. 2002). Here, Continental limited its liability for lost luggage to $2,800.[FN2] It also excluded any liability for, *inter alia*, heirlooms, irreplaceable items, and jewelry. When Malik bought her ticket

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[FN1] Malik does not challenge the value of her non-excluded items on appeal.

[FN2] Federal law restricts how low a carrier can limit its liability for lost luggage. When Continental lost Malik's bag, that limit was set at $2,800. It has since increased. *See* 14 C.F.R. § 254.4 (2008).

through an online travel service she acknowledged that Continental's Contract of Carriage applied, that carriers may limit their liability for lost baggage, and that more information regarding luggage liability restrictions could be obtained from the carrier. A full copy of Continental's Contract of Carriage was available to Malik on Continental's website. Further, Malik was given a notice of Continental's liability limitations when she received her boarding pass. This notice indicated that Continental limited its liability for lost baggage to $2,800 and "assumed no liability for fragile, valuable or perishable articles that are lost, damaged, or delayed." It also instructed that further information could be obtained from the carrier. In *Casas*, we enforced a similar exclusion in like circumstances, and the district court correctly enforced the exclusions here. *See* 304 F.3d at 524-25.

Malik makes several attempts to distinguish our precedent, but none is persuasive. She contends that she was not given reasonable notice of the liability exclusions because her bag was checked by airline personnel without her permission. Continental, however, reserved the right to check any passenger's bag in the Contract of Carriage by which Malik agreed to be bound. Malik's further argument that Continental's liability exclusion is invalid because it violates 14 C.F.R. § 254.4 is also foreclosed by this court's precedent. *See id.* at 525. Finally, Malik alleges that Continental's staff repeatedly assured her after she reached her final destination that her suitcase had been found and would arrive on the "next plane." The suitcase never arrived, and Malik asserts that these allegedly false assurances warrant abrogating Continental's

liability exclusions. Malik cites no authority for this proposition, and the Court finds no support for Malik's position in our case law.

**2

*(Cite as: 369 Fed.Appx. 588, *589, 2010 WL 835584, **2 (C.A.5 (Tex.)))*

The judgment of the district court is AFFIRMED.

March 10, 2010.

Appendix: "D"

U.S. COURT OF APPEALS OPINION

ON PETITION FOR REHEARING:

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

ANJUM MALIK,
Plaintiff-Appellant

v.

CONTINENTAL AIRLINES, INC.,
Defendant-Appellee

No: 09-50444
Summary Calendar.
March 10, 2010.

[*Appeal from the U.S. District Court for the Western District of Texas, Austin*]

PER CURIAM OPINION ON PETITION FOR REHARING EN BANC

ON PETITION FOR REHEARING EN BANC

(Opinion of **3/10/2010**, 5th Cir., unpublished)

Before **GARZA**, **CLEMENT**, and **OWEN**, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is **DENIED**. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is **DENIED**.

ENTERED FOR THE COURT:

/s/ E. CLEMENT
UNITED STATES CIRCUIT JUDGE

April 9, 2010.